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12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION
15

16 B&O MANUFACTURING, INC.,

17 Plaintiff,

18 v.

19 HOME DEPOT U.S.A., INC.,

20 Defendant.
21

CASE NO. C07 02864 JSW

**DEFENDANT HOME DEPOT U.S.A.,
INC.'S REPLY IN SUPPORT OF ITS
MOTION TO DISMISS COUNTS I AND III
OF PLAINTIFF'S THIRD AMENDED
COMPLAINT**

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28 **DEFENDANT HOME DEPOT U.S.A., INC.'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS
COUNTS I AND III OF PLAINTIFF'S THIRD AMENDED COMPLAINT**

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**DEFENDANT HOME DEPOT U.S.A., INC.'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS
COUNTS I AND III OF PLAINTIFF'S THIRD AMENDED COMPLAINT**

I. SUMMARY OF ARGUMENT

B&O Manufacturing, Inc. initiated this lawsuit in the summer of 2007. Three amended complaints later, the majority of B&O's claims still fail as a matter of law under the clear terms of the relevant contracts. B&O's Opposition Memorandum ("B&O Opp.") cites no relevant authority to support B&O's position. Instead, B&O is left to try to manufacture ambiguity through implausible constructions of the simple contract language at issue. The Court should reject B&O's arguments and grant Home Depot U.S.A., Inc.'s Motion to Dismiss Counts One and Three.

II. B&O's Claim for Breach of the MOU is Time Barred.

As B&O does not dispute, the MOU states that "[B&O] agrees to bring any claim or dispute against The Home Depot (including payment disputes) within one year after the occurrence of the event giving rise to such dispute." 2005 Expense Buying Agreement, Exh. C to MOU, ¶ 15.7 at 8; B&O Opp. at 2-3. B&O also does not dispute that it did not bring its MOU claims within one year. Instead, B&O contends that: (1) Home Depot failed to raise timeliness in prior motions; (2) the MOU's one year limitation clause is ambiguous; and (3) a contractual one-year time bar is unenforceable. These arguments cannot save Count One.

A. Home Depot's Motion to Dismiss Count One Was Not Waived.

The fact that Home Depot previously had not raised the MOU's one-year limitations period does not foreclose Home Depot's motion. As B&O concedes, there is no rule against sequential motions to dismiss—just as there is no rule against sequential complaints. *See* B&O Opp. at 1. To the contrary, the Federal Rules permit a defendant to raise a defense for failure to state a claim even if that defense was available and not raised in an earlier motion to dismiss. *See* Fed. R. Civ. P. 12(g) and (h). According to Rule 12(g)(2), "*(e)xcept as provided in Rule*

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1 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under
 2 this rule raising a defense or objection that was available to the party but omitted from its earlier
 3 motion.” Fed. R. Civ. P. 12(g)(2) (emphasis added). The Rule 12(h)(2) exception permits
 4 defendants to raise a defense of failure to state a claim “(A) in any pleading allowed or ordered
 5 under Rule 7(a); (B) by a motion under Rule 12(c); or (C) at trial.” Fed. R. Civ. P. 12(h)(2).
 6 Thus, “a defendant does not waive its right to assert that the plaintiff has failed to state a claim
 7 upon which relief can be granted simply by not including that defense in its initial Rule 12(b)
 8 motion to dismiss.” *Lindsey v. United States*, 448 F. Supp. 2d 37, 54-55 (D.D.C. 2006).

9
 10 B&O has repeatedly revised and amended its claims, and Home Depot has already filed
 11 its Answer to B&O’s current Complaint. Because Home Depot’s motion to dismiss will not
 12 delay the litigation, it should be heard by the Court. *Id.* Even if the Court were to construe
 13 Home Depot’s motion as a Rule 12(c) motion on the pleadings rather than under Rule 12(b)(6),
 14 the result must be the same because the MOU’s clear language bars any B&O claim under the
 15 MOU. B&O offers no legal or practical reason that the Court should not consider the timeliness
 16 of Count One upon the instant motion.

17
 18 **B. The MOU’s One-Year Limitations Period is Unambiguous**

19
 20 B&O contends that the MOU’s straightforward words “bring any claim or dispute” are
 21 ambiguous, and that they could encompass “something other than litigation.” *See* B&O Opp. at
 22 2. As the California Supreme Court has explained, “[c]ourts will not strain to create an
 23 ambiguity where none exists.” *Waller v. Truck Ins. Exchange, Inc.*, 11 Cal. 4th 1, 18-19 (1995).
 24 There is nothing ambiguous about the common and straightforward phrase “bring any claim or
 25 dispute,” which is widely used to refer to litigation.

26
 27 Even if the Court were to accept B&O’s tortured construction of “bring any claim,”

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nothing in B&O's complaint or its brief suggests that B&O did anything else to bring its MOU claim within the relevant time period. B&O offers two alternative meanings for the bringing a claim or dispute: (1) initiating mediation or (2) informing Home Depot of the claim. Neither B&O's complaint nor its brief makes any suggestion that B&O took either of these steps during the year after the events giving rise to B&O's claims for breach of the MOU took place. Accordingly, B&O's claims under the MOU would still be time-barred even if the Court accepted B&O's strained ambiguity argument.

Nor is B&O correct that the mention of a Reference Guide in section 15.7, second sentence forecloses Home Depot's motion. The first sentence of section 15.7 refers to "any claim or dispute against The Home Depot (including payment disputes)." *See* Exh. C to MOU. The second sentence goes on to state that the Reference Manual governs payment disputes, which plainly constitutes a subset of the larger category of "any disputes." B&O's Count I concerns the allegation that Home Depot failed to place orders for product. *See* Third Am. Compl. ¶¶ 6-12. Because that claim cannot be characterized as a payment dispute, B&O's argument is a non sequitur.

C. The MOU's One Year Time Limit is Enforceable.

California Commercial Code Section 2725(1) explicitly allows contracts for the sale of goods to "reduce the period of limitation to not less than one year." Cal. Comm. Code § 2725(1). As noted in Home Depot's opening brief, California courts have already held that a contract clause setting a one-year limitation period is enforceable even if it applies to only one party to the contract. *See Therma-Coustics Mfg., Inc. v. Borden, Inc.*, 167 Cal. App. 3d 282, 296 (1984). B&O contends that *Therma-Coustics* is not on point, but the very introduction to that case states that it concerns the enforceability of a "limitation of one year within which *the buyer*

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1 could commence an action under this contract after such action had accrued.” *Id.* at 284
 2 (emphasis added).

3 B&O cites no law or any other authority that would give the Court any reason to doubt
 4 the enforceability of the MOU’s limitations clause. In fact, “California courts have uniformly
 5 enforced provisions shortening the four-year statutory limitations period for breach of a written
 6 contract to one year.” *Moreno v. Sanchez*, 106 Cal. App. 4th 1415, 1440 (2003). “[E]xcept as
 7 restricted by statute, California courts accord contracting parties substantial freedom to modify
 8 the length of the statute of limitations.” *Hambrech & Quist Venture Partners v. American*
 9 *Medical Int’l, Inc.*, 38 Cal. App. 4th 1532, 1548 (1995). In this case, a California statute
 10 expressly authorizes the curtailed limitations on which Home Depot relies. Neither Section 2725
 11 of the Commercial Code nor any other provision of law requires that a contractual clause
 12 shortening the limitations period apply to both parties. Multiple courts outside of California
 13 have also enforced one-year contractual limitations clauses that apply to only one party.
 14 *See Hays v. Mobil Oil Corp.*, 930 F.2d 96, 100 (1st Cir. 1991); *NMP Corp. v. Parametric Tech.*
 15 *Corp.*, 958 F. Supp. 1536, 1548 (N.D. Okla. 1997).

16 **III. COUNT THREE SHOULD BE DISMISSED BECAUSE HOME DEPOT HAD AN**
 17 **UNAMBIGUOUS RIGHT TO TERMINATE THE 2006 EBA.**

18 B&O acknowledges that the 2006 EBA includes a clause entitled “Term and
 19 Termination” that permits Home Depot to terminate the agreement with 60-days notice. *See*
 20 EBA, ¶ 3.1; B&O Opp., at 6 (“B&O does not dispute that the printed form [EBA] contains a 60-
 21 day termination clause.”). B&O nevertheless insists that this termination clause was subsumed
 22 and eliminated by the EBA’s pricing exhibit, an attachment that says nothing at all about the
 23 parties’ rights to terminate the agreement. *Id.* at 6-7. B&O reaches this conclusion even though
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1 the pricing exhibit actually refers to and incorporates the EBA's term by setting pricing and
 2 volumes "within the dates specified above." *Id.*

3 According to B&O, the five words "within the dates specified above" in the EBA's
 4 pricing exhibit do not incorporate the EBA's Term and Termination clauses. Rather, B&O
 5 argues that these five words *revoke* these three paragraphs of the EBA ("Term," "Term and
 6 Termination," and "Effect of Termination," *see* EBA ¶¶ 3.0-3.2). In B&O's estimation, the
 7 words "within the dates specified above" force Home Depot to comply with the EBA for the
 8 dates mentioned only in the EBA's introductory paragraph. *See* B&O Opp. at 6-7.

10 B&O has not identified any conflict between the EBA and the pricing exhibit. Because a
 11 conflict presents the only grounds on which B&O could argue that the exhibit's language might
 12 control instead of the EBA, B&O cannot ignore the EBA's termination provisions. Moreover,
 13 B&O's strained construction of the EBA contradicts the principle that "[t]he construction which
 14 will uphold a contract in whole and in every part is to be preferred, and the whole contract
 15 should be looked to in arriving at the construction of any part." O.C.G.A. § 13-2-2(4).¹ "It is
 16 axiomatic that any construction that renders portions of the contract language meaningless
 17 should be avoided." *Atlanta Dev., Inc. v. Emerald Capital Invs., LLC*, 258 Ga. App. 472, 478,
 18 574 S.E.2d 585, 590 (2002).

21 B&O's claims for wrongful termination should be dismissed with prejudice, including
 22 B&O's claims for "retroactive pricing damages" and for Home Depot's alleged failure to buy
 23 "substantial quantities of [] product." *See* B&O Opp. at 8; Third Am. Compl., ¶¶ 24, 27. The
 24 sole basis for either of these claims is Home Depot's supposedly wrongful termination of the
 25

26 ¹ The EBA is a Georgia contract. *See* EBA ¶ 16.0.

1 EBA. *See* Third Am. Compl., ¶ 24 (alleging that “retroactive modification” of the EBA’s pricing
2 was warranted “[d]ue to HD’s early termination.”); *id.* at ¶ 27 (failing to identify any way in
3 which Home Depot breached the EBA by failing “to purchase substantial quantities of completed
4 product” other than the allegedly wrongful termination noted elsewhere in Count Three).

5
6
7 **CONCLUSION**

8 For the reasons set forth above, the Court should dismiss Counts One and Three with
9 prejudice for failure to state a claim.

10 DATED: May 5, 2008

BONDURANT, MIXSON & ELMORE, LLP

11
12 By: /s/Ronan P. Doherty

13 Ronan P. Doherty

14 Christopher T. Giovinazzo

15 Attorneys for Defendant

16 HOME DEPOT U.S.A., INC.

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CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2008 I have electronically filed the within and foregoing
**DEFENDANT HOME DEPOT U.S.A., INC.'S REPLY IN SUPPORT OF ITS MOTION
TO DISMISS COUNTS I AND III OF PLAINTIFF'S THIRD AMENDED COMPLAINT**
with the Clerk of Court using the CM/ECF system which will automatically send email
notification of such filing to the following attorney of record, and by U.S. mail, postage prepaid
thereon, addressed as follows:

Paul E. Rice
Rice & Bronitsky
350 Cambridge Ave., Suite 225
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/s/Ronan P. Doherty
Ronan P. Doherty

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